In The

Supreme Court of the United States

October Term, 1976

No. 76-313

PAULA GROSSMAN,

Petitioner,

vs.

BERNARDS TOWNSHIP BOARD OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Bernards Township Board of Education, respectfully submits the following brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of dimissal entered by the district court, pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(b)(1).

OPINION BELOW

The judgment order of the court of appeals affirming the district court dated June 8, 1976, and the opinion of the district court in dismissing petitioner's cause of action are not reported, but both are appended to the petition for a writ of certiorari as Appendix A and Appendix B.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

STATUTES INVOLVED

The relevant portion of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunities Act of 1972, 42 U.S.C. Section 2000e, *et seq.* are 42 U.S.C. Section 2000e-2(a)(1) which provides:

> "A. Employers. It shall be an unlawful employment practice for an employer —
>
> 1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

QUESTIONS PRESENTED

Petitioner has listed five questions for consideration, none of which are properly applicable to the case *sub judice*. The Statement of the Case and the petitioner's argument indicate that the only issue which might be presented is: "Did petitioner properly invoke the jurisdiction of the federal courts pursuant to the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, *et seq.* in light of the peculiar factual context of the present case?" or, more succinctly: "Does Title VII of the Equal Employment Opportunity Act of 1972, U.S.C. §2000e, *et seq.* provide a cause of action for alleged discrimination resulting from a novel surgical procedure?"

STATEMENT OF THE CASE

A. The State Administrative and Appellate Proceedings

In May, 1971, Paul M. Grossman (the petitioner Paula M. Grossman, hereinafter sometimes referred to in the female gender) announced to the Superintendent of the Bernards Township School System that she had recently undergone a surgical procedure commonly referred to as "sex reassignment surgery", and had thereby allegedly been converted from the male to the female sex. Petitioner informed the Superintendent that she intended to discard her male attire and return to the classroom during the Fall Term in her new gender role.

Because of the novel problem presented to respondent School Board, the assistance of medical, legal and other experts was sought by respondent to determine the effects, if any, engendered by the return of a male teacher to lower grade classes in a new gender role. Respondent's study of the situation was carried out through the months of June and July, 1971. Respondent met with petitioner, experts suggested by petitioner, as well as petitioner's legal counsel. During the summer of 1971, the School Board was told by its consulting child psychiatrist that there would be adverse emotional and psychological consequences to the children if petitioner returned as a woman. Thereafter, respondent Board proposed to petitioner various alternatives to assure that the students would be protected from the predicted harm. Petitioner refused every alternative proposed, taking the position that only her return to the classroom would satisfy her needs. Petitioner disputed the recommendation of the School Board psychiatrist.

On August 19, 1971, petitioner was suspended[1] by the School Board on the grounds, *inter alia,* that her return would adversely affect the children, and thereafter charges were certified to the Commissioner of Education of the State of New Jersey pursuant to N.J.S.A. 18A:6-10.[2] A full hearing before the Commissioner was held on December 8, 10, 17, 18, 27 and 28, 1971. On April 10, 1972, the Commissioner, in a lengthy opinion, sustained the respondent School Board's suspension and ordered petitioner's dismissal as a teacher for reason of just cause due to incapacity. The Commissioner found that:

> "In the instant matter, however, the overreaching responsibility of the Commissioner and the local Board of Education is to the children of Bernards Township. Because of this,

1. N.J.S.A. 18A:6-14 does not empower a school board to discharge, but only to suspend a teacher.

2. N.J.S.A. 18A:6-10.Dismissal and reduction in compensation of persons under tenure in public school system.

No person shall be dismissed or reduced in compensation,

> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or
>
> (b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner:

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

> the Commissioner relies heavily on the testimony of the child psychiatrist, who states in unequivocal terms that the children of Bernards Township would be harmed by Respondent's [Petitioner Grossman's] reappearance as a teacher."

On February 7, 1973, the State Board of Education unanimously affirmed the Commissioner's determination of dismissal. Thereafter, in a decision rendered on February 20, 1974, the Superior Court of New Jersey, Appellate Division, unanimously affirmed petitioner's dismissal, *In re Tenure Hearing of Grossman,* 127 N.J. Super. 13 (App. Div. 1974).

On May 29, 1974, the Supreme Court of New Jersey denied petitioner's request for certification. *In re Tenure Hearing of Grossman,* 65 N.J. 292 (1974).

Petitioner did not seek review by this Supreme Court of the United States.

B. The Federal Administrative and Court Proceedings

On August 11, 1972, petitioner filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) charging that she was suspended from her teaching position ". . . for having had a sex-reassignment, ..." On September 24, 1974, the EEOC denied the charge of discrimination.[3]

On December 4, 1974, petitioner filed a complaint in the United States District Court of New Jersey alleging that she had undergone sex reassignment surgery and was dismissed by respondent solely because of the fact that she was a woman. Jurisdiction was alleged as being valid under provisions of the National Labor Relations Act, as amended by the Labor

3. See note 9, *infra.*

Management Relations Act of 1947, 29 U.S.C. §151, *et seq.*; 28 U.S.C. §1343, and the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, *et seq.* The complaint alleged violations of 42 U.S.C. §§1981, 1983, 1985, 1988 and 2000e.

Respondent moved for the dismissal of the cause of action pursuant to Fed. R. Civ. P. 12(b)(1); Fed. R. Civ. P. 12(b)(6) and, in the alternative, Fed. R. Civ. P. 56. On September 10, 1975, the district court, after initial discovery proceedings had been completed, dismissed the complaint for failure to state a claim upon which relief might be granted, and due to the lack of subject matter jurisdiction. The opinion of the district court is annexed to the petition for a writ of certiorari as Appendix A.

On June 8, 1976, the United States Court of Appeals for the Third Circuit affirmed the decision of the district court. The judgment order of the circuit court of appeals is annexed to the petition for a writ of certiorari as Appendix B.

REASONS FOR DENIAL OF THE WRIT

Petitioner's sole rationale in seeking certiorari is founded upon the erroneous contention that she was "discharged"[4] by the School Board by reason of her female gender, and, therefore, a cause of action is appropriate under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, *et seq.*

Respondent has throughout the long tenure of the present litigation and its progeny always taken issue with petitioner's claim that by virtue of surgery he has medically altered nature's course and become a female.[5] The School Board has consistently based its consideration of the suspension of petitioner on the

4. See note 1, *supra.*

5. The defendant [School Board] vigorously denies the allegation of sex discrimination, arguing that such could not have occurred because the plaintiff [petitioner], despite the medical and surgical procedures performed, remains a member of the male gender (Opinion of United States District Court, Appendix A, p. 7a).

(Cont'd)

welfare of the system's students and the potential for harm that Grossman's return to the classroom would have on those students. Petitioner's dismissal by the Commissioner of Education agreed with respondent's assessment, finding:

> "In the instant matter, however, we are not talking about fitness in the sense that the individual teacher committed an overt act against a child or school district, but rather that she, by

(Cont'd)

In response to demands for admissions served upon petitioner, the following demand and response were developed.

> "30. Admit that on September 1, 1971 plaintiff was of the male gender.
>
> Denied with the explanation that the plaintiff will always be a genetic male but is presently a socialogical [sic] female."

Respondent presented extensive expert medical evidence at the hearing before the Commissioner of Education demonstrating that a sex reassignment operation could not, in fact, accomplish a change of gender. The evidence presented by respondent's witnesses, Drs. Charles Socarides, Alan Kidwell and Harvey Hammer demonstrated that changes inflicted by surgical procedure and female hormones could only alter genitilia and some secondary sex characteristics, not genetic or reproductive physiology, and especially not deep-seated psychological gender characteristics.

Dr. Charles W. Socarides testified for respondent during the hearing before the Commissioner of Education, that:

> "Question: All right, Dr. Socarides, after surgery, is the person, this is a male transsexual, is a person a male or a female chromosomally? Answer: I'm glad you asked that, Mr. Millspaugh, and that is one of the most important items. You can do everything, you can change the body, the clothes, you've taken off the penis, you've taken out the testes, you've invaginated the scrotum, you've given endocrine preparations until they're coming out of a person's ear and you face the danger of carcinoma of the breast, you haven't changed the psychological problems, and yet if you do a buccal epithelial smear, that is you take a smear on the inside of a person's cheek and you subject it to chromosome studies, you'll find that this person is still a male. Evolution will not be bypassed it seems, and nature cannot be so easily cheated." See Transcript of Proceedings before the Commissioner of Education, December 9, 1971, at pp. 47-48.

her presence in the classroom, manifests danger to the mental health of the pupils."[6]

The Superior Court of New Jersey, Appellate Division defined the issue as follows:

> "The principal issue in this novel case is whether a male tenured teacher who underwent sex-reassignment surgery to change his external anatomy to that of a female can be dismissed from a public school system on the sole ground that his retention would result in potential emotional harm to the students."[7]

The federal district court also concurred:

> "In such an instance, despite the plaintiff's conclusory allegations of sex discrimination, it is nevertheless apparent on the basis of the facts alleged by the plaintiff that she was discharged by the defendant school board *not* because of her status as a female, but rather because of her change in sex from male to female gender."[8]

Petitioner's prior position is also in direct conflict with the claim of sex discrimination presented to the district court. In her

6. *In the Matter of the Tenure Hearing of Paula M. Grossman*, Decision of Commissioner of Education, page 35.

7. *In re Tenure Hearing of Grossman*, 127 N.J. Super. 13, 19 (App. Div. 1974).

8. Opinion of United States District Court, Petition for Writ of Certiorari, Appendix A, p. 7a.

In an affidavit dated May 24, 1975 and filed with the district court in the instant litigation, petitioner states, in part:

> "I was 'formally discharged' simply because I had an operation which according to Paul F. Mallon, President of the School Board for the Township of Bernards in a Statement of Charges, dated August 19, 1971 changed me from a male into a female."

filing of a charge of discrimination with the EEOC, petitioner stated:

> "I was suspended from my tenured position after fourteen years on August 19, 1971 for having had a sex-reassignment, which is an unusual, but nonetheless perfectly legitimate medical problem."[9]

Petitioner's allegation that she was the victim of discrimination because of her female gender is, therefore, simply contrary to the voluminous record that has preceded this petition. Petitioner's suspension by respondent Board was effected by virtue of the Board's judgment, after extensive professional consultation, that Grossman's return to the classroom would present a danger of psychological and emotional harm to the children. There is not a scintilla of evidence that could lead to the allegation that petitioner was suspended because she is a woman. On the contrary, the record is clear that respondent never accepted the concept that petitioner had, in fact, been converted to the female gender. It is, therefore, difficult to believe that petitioner's allegation of discrimination predicated upon "her female gender" is factually attributable to this respondent School Board.

Stripped of the incorrect and refuted contention of discrimination based upon sex, the only question that remains is

9. Charge of Discrimination filed by petitioner on August 11, 1972. The EEOC's decision on September 24, 1974 concluded that:

> "Although the operation in question was a sex reassignment, we find nothing in the legislative history of Title VII to indicate that such claims were intended to be covered by Title VII. Absent evidence of a Congressional intent to the contrary, we interpret the phrase 'discrimination because of sex,' in accordance with its plain meaning, to connote discrimination because of gender. We, therefore, are compelled to conclude that Charging Party's [Petitioner] termination, based in part upon having undergone a sex reassignment operation, does not constitute discrimination because of sex. [Footnotes omitted.]

whether Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, *et seq.* intended to provide a cause of action for alleged discrimination predicated upon a novel surgical procedure and the effects caused by that procedure. A plethora of federal court decisions clearly deny such a basis as being actionable under 42 U.S.C. §2000e, *et seq. Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Willingham v. Macon Telegraph Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975).

The legislative history of Title VII of the Civil Rights Act of 1964 contains no legislative history which would indicate any intent by Congress to include medical procedures or transsexuals within the language of Title VII. House Report No. 914, 88th Cong., 2d Sess. (1964); U.S. Code Cong. & Adm. News 1964, p. 2391, 2401. See also *Frontiero v. Richardson*, 411 U.S. 677, 686 (1972). It is clear that Congress, in fact, included the category of "sex" by amendment, as an afterthought provision, without either debate or prior legislative hearings.[10] *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199, 204 (3d Cir. 1975).

Petitioner piles one invalid assertion upon another and produces thereby a mystical violation of the Fourteenth Amendment, claiming that she has been denied equal protection of the laws. Petitioner does not, however, define the basis of such an untenable claim, nor has petitioner advised the court that the same vague contention has already been twice rejected in other forums.[11]

10. Several bills seeking to amend the Civil Rights Act of 1964 were introduced in the House of Representatives. See, *e.g.*, H.R. 10,389, 94th Cong., 1st Sess. (1975); and H.R. 5452, 94th Cong., 1st Sess. (1975). These bills deal with affording coverage to those who are being discriminated against for their "sexual or affectional preference." Not even those proposed amendments would cover the illusory allegations of petitioner's complaint. See 121 Cong. Rec. E 1441, E 1442 (daily ed. March 25, 1975) (remarks of Cong. Abzug re H.R. 5452). See also footnote 3, *supra*. H.R. 10,389 and H.R. 5452 are presently pending in the House Subcommittee on Civil and Constitutional Rights.

11. The Superior Court of New Jersey, Appellate Division, found:

(Cont'd)

The action by respondent in suspending a teacher on the ground that the teacher would pose a potential for danger or harm to students is neither a unique procedure or invidious classification. *Morrison v. State Board of Education*, 82 Cal. Rptr. 175, 461 P.2d 375 (Sup. Ct. 1969); *Board of Trustees of Compton Jr. Col. Dist. v. Stubblefield*, 16 Cal. App. 3d 820, 94 Cal. Rptr. 318, 321 (Ct. App. 1971).

Petitioner misreads the prior decisions of the district court and court of appeals as finding that transsexuals are somehow second-class citizens (Petition for Writ of Certiorari, p. 6). Nothing contained in the litigation to date has even ventured into the broad general question of a transsexual's legal status. On the contrary, the causes of action relating to petitioner's suspension have dealt with the very narrow issue of the specific effects of this petitioner's return to the respondent school system's classrooms, and the validity of respondent's decision to suspend Grossman because of the potential harm to students.

It is clear, after reviewing the petition for a writ of certiorari, that petitioner is simply seeking another forum in which to relitigate, rather than presenting an important or controverted legal issue which is either in controversy in the

(Cont'd)

> "We perceive no merit in the argument that Mrs. Grossman's 'constitutional rights to equal protection of the laws have been violated by the application of standards resulting in her dismissal where the same standards are not applied to other teachers in the same school system.' It has not been demonstrated that the standard of unfitness based upon a teacher's adverse emotional effect upon students would not be applied to other teachers if the facts warranted such result." *In re Tenure Hearing of Grossman*, 127 N.J. Super. 13, 33-34 (App. Div. 1974).

The U.S. District Court found:

> "No facts are alleged to indicate, for example, that plaintiff's employment was terminated because of any stereotypical concepts about the ability of females to perform certain tasks, *Pond v. Braniff Airways, Inc.*, 500 F.2d 161, 166 (5th Cir. 1974), nor because of any condition common only to woman. *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199 (3d Cir. 1975) (pregnancy)."

courts or is of sufficient importance to warrant review by this Court. The novel issues of this case are factual, not legal. The facts, as well as the law, have already been litigated and reviewed a half dozen times before, and each time the appropriate authorities have validified and supported the respondent's conduct. More importantly, it is clear that Title VII did not enfranchise a cause of action for alleged discrimination resulting from unique medical procedures.

The petition for a writ of certiorari fails to present any legal question sufficient to meet the standards of this Court (Sup. Ct. R. 19).

CONCLUSION

For the reasons stated above, respondent says that a petition for a writ of certiorari should be denied.

Respectfully submitted,

s/ Theodore Margolis

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